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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

SIERRA CLUB, WILDEARTH) Case No.: No. C 08-850-VRW
GUARDIANS, AND ROCKY MOUNTAIN)
CLEAN AIR ACTION,) JOINT CASE MANAGEMENT
Plaintiffs,) STATEMENT
vs.)
U.S. DEPARTMENT OF INTERIOR, AND)
DIRK KEMPTHORNE, in his official)
capacity as Secretary of the Interior,)
Defendants)

1. Jurisdiction and Service: The basis for the court's subject matter jurisdiction over
2 plaintiff's claims and defendant's counterclaims, whether any issues exist regarding
3 personal jurisdiction or venue, whether any parties remain to be served, and, if any
4 parties remain to be served, a proposed deadline for service.

5 Jurisdiction is based on 28 U.S.C. § 1331 and 28 U.S.C. §§ 2201-2202 . No issues exist
6 over personal jurisdiction or venue and all parties have been served. However, Defendants
7 believe the Court may be lacking jurisdiction because Plaintiffs do not have standing and the
8 case is or will be moot.

9
10 2. Facts: A brief chronology of the facts and a statement of the principal factual
11 issues in dispute.

12 Coal bed methane is a form of natural gas held in coal seams by water pressure. Water
13 permeates the coal beds and its pressure causes the methane to be absorbed onto the grain
14 surfaces of the coal. To facilitate extraction of the methane, the water is pumped out of the coal
15 seams, which lowers the pressure, allowing the release of methane gas from coal.

16 A hydraulic fracturing technique is sometimes employed to extract the largest quantity of
17 methane possible. This technique uses a mixture of water, fluids and sand, which are forced into
18 wells at very high pressures to hydraulically fracture the coal seams. Sand particles in the
19 hydraulic fluid prop up the widened and newly created fractures in the coal, allowing more
20 methane gas to escape after much of the hydraulic fluid and ground water have been pumped out
21 the wells. At the current time, Defendants do not know whether hydraulic fracturing fluids cause
22 adverse health effects.

1 The Energy Policy Act of 2005 provides:

2 **SEC. 1811. COAL BED METHANE STUDY.**

3 (a) STUDY.—

4 (1) IN GENERAL.—The Secretary of the Interior, in consultation with the
5 Administrator of the Environmental Protection Agency, shall enter into an
6 arrangement under which the National Academy of Sciences shall conduct a study
7 on the effect of coal bed natural gas production on surface and ground water
resources, including ground water aquifers, in the States of Montana, Wyoming,
Colorado, New Mexico, North Dakota, and Utah.

8
9 (2) MATTERS TO BE ADDRESSED.—The study shall address the effectiveness
10 of—

- 11 (A) the management of coal bed methane produced water;
12 (B) the use of best management practices; and
13 (C) various production techniques for coal bed methane natural gas in
14 minimizing impacts on water resources.

15 (b) DATA ANALYSIS.—The study shall analyze available hydrologic, geologic and
water quality data, along with—

16
17 (1) production techniques, produced water management techniques, best
management practices, and other factors that can mitigate effects of coal bed
methane development;

18
19 (2) the costs associated with mitigation techniques;

20
21 (3) effects on surface or ground water resources, including drinking water,
associated with surface or subsurface disposal of waters produced during
extraction of coal bed methane;

22
23 and

24 (4) any other significant effects on surface or ground water resources associated
with production of coal bed methane.

25 (c) RECOMMENDATIONS.—The study shall analyze the effectiveness of current
mitigation practices of coal bed methane produced water handling in relation to

1 existing Federal and State laws and regulations, and make recommendations as t
2 changes, if any, to Federal law necessary to address adverse impacts to surface or
ground water resources associated with coal bed methane development.

3
4 (d) COMPLETION OF STUDY.—The National Academy of Sciences shall submit
the findings and recommendations of the study to the Secretary of the Interior and
5 the Administrator of the Environmental Protection Agency within 12 months after
the date of enactment of this Act, and shall upon completion make the results of the
6 study available to the public.

7
8 (e) REPORT TO CONGRESS.—The Secretary of the Interior and the Administrator
of the Environmental Protection Agency, after consulting with States, shall report to
the Congress within 6 months after receiving the results of the study on—

- 9
10 (1) the findings and recommendations of the study;
11 (2) the agreement or disagreement of the Secretary of the Interior and the
Administrator of the Environmental Protection Agency with each of its findings
12 and recommendations; and
13 (3) any recommended changes in funding to address the effects of coal bed
14 methane production on surface and ground water resources.

15 P.L. 109-58 § 1811 (Aug. 8, 2005).

16 It is after August 8, 2006. The National Academy of Sciences has not submitted the
17 findings and recommendations of the study described above to the Secretary of the Interior and
18 the Administrator of the Environmental Protection Agency and has not made the results of the
19 study available to the public.

21 Defendants assert that they have entered into an agreement with the National Academy of
22 Sciences to commence work on the coal bed methane analysis. Plaintiffs dispute that this
23 “analysis,” which has consisted of the National Academy of Sciences holding a meeting to listen
24 to various presentations but did not produce a written document, is the “study” required by P.L.
25 109-58 § 1811.

1 3. Legal Issues: A brief statement, without extended legal argument, of the disputed points
2 of law, including reference to specific statutes and decisions.

3 Plaintiffs do not know what issues, if any, Defendants intent to dispute except for
4 whether Plaintiffs have standing to pursue this case, whether this case is moot, and whether the
5 Court has jurisdiction to grant the relief plaintiffs seek. Plaintiffs believe that P.L. 109-58 §
6 1811 imposing a clear mandatory duty which Defendants have clearly violated. Plaintiffs have
7 requested that Defendants explain what basis Defendants have for defending this case other than
8 standing, mootness and that the Court does not have jurisdiction to grant the relief plaintiffs seek.
9 Defendants have not responded.

10 As noted in Item 11, below, defendants believe that the type of Court supervision of the
11 reporting process that plaintiffs contemplate is beyond the jurisdiction of this Court and is
12 otherwise unavailable under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.
13 Defendants reserve the right to raise additional issues or defenses, if the Court does not grant
14 defendants' motion for judgment on the pleadings on standing grounds [Dkt. #20].

15 Furthermore, Plaintiffs believe that this case is not record review. *See e.g. Friends of the*
16 *Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000). Defendants believe that this case is
17 reviewable on the administrative record, but that the record may include materials and
18 information developed up to the present, as the Ninth Circuit in *Clearwater* ruled.
19

20 4. Motions: All prior and pending motions, their current status, and any anticipated motions.

21 On May 30, 2008, defendant filed a motion for judgment on the pleadings [Dkt. #20]
22 challenging plaintiffs' standing. That motion is scheduled to be heard on the same day as the
23 Case Management Conference, August 28, 2008. If that does not resolve the matter, the parties
24 anticipate filing cross-motions for summary judgment.
25

1 5. Amendment of Pleadings: The extent to which parties, claims, or defenses are expected
2 to be added or dismissed and a proposed deadline for amending the pleadings.

3 The parties do not believe the pleadings will need to be amended.
4

5 6. Evidence Preservation: Steps taken to preserve evidence relevant to the issues reasonably
6 evident in this action, including interdiction of any document-destruction program and
7 any ongoing erasures of e-mails, voice mails, and other electronically-recorded material.
8

9 Plaintiffs have requests that Defendants preserve all e-mails and other electronic
10 documents from management level personnel regarding the preparation of a study pursuant to
11 P.L. 109-58 § 1811. Defendants believe that, because this case is exempted from the initial
12 disclosure requirements, Fed. R. Civ. P. 26(a)(1)(B)(i), the parties are exempted from the
13 otherwise applicable requirements of Fed. R. Civ. P. 26(f), including the requirement to discuss
14 evidence preservation, *see* Fed. R. Civ. P. 26(f)(1). Nevertheless, on April 21, 2008, Defendants
15 undertook steps to preserve documents pertinent to this action and that may be included in the
16 administrative record.

17 7. Disclosures: Whether there has been full and timely compliance with the initial disclosure
18 requirements of Fed. R. Civ. P. 26 and a description of the disclosures made.
19

20 Plaintiffs will make their disclosures shortly. Defendants believe this is not necessary
21 because this is a record review case. *See* Fed. R. Civ. P. 26(a)(1)(B)(i). Defendants to date have
22 received no disclosures from plaintiffs.
23
24
25

1 8. Discovery: Discovery taken to date, if any, the scope of anticipated discovery, any
2 proposed limitations or modifications of the discovery rules, and a proposed discovery
3 plan pursuant to Fed. R. Civ. P. 26(f).

4 There has been no discovery to date. Plaintiffs believe discovery will be very limited.
5 Plaintiffs believe they will need to obtain some information, via one round of document requests
6 and interrogatories, regarding Defendants' alleged "agreement with the National Academy of
7 Sciences to commence work on the coal bed methane analysis." Plaintiffs will also want to take
8 one third party deposition of someone with the National Academy of Sciences unless the
9 National Academy of Sciences is willing to submit an affidavit consistent with their statements
10 in the media about the lack of an agreement to conduct a study.

11 Defendants believe this discovery is not appropriate, because this is a record review case.
12 Defendants argue that deposition discovery is rarely appropriate in a case brought under the
13 judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706.
14 *See, e.g., United States v. Morgan*, 313 U.S. 409, 421–22 (1941); *Morgan v. United States*, 304
15 U.S. 1, 18 (1938); *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 & n.6, 834–36 (9th Cir.
16 1986). Nor is it appropriate for the court to conduct an evidentiary hearing or otherwise examine
17 matters outside the administrative record. The "review of agency action . . . is limited to the
18 administrative record and may only be expanded beyond the record to explain agency decisions,"
19 *Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1144 (9th Cir. 2006)
20 (emphasis added), or to otherwise "plug holes" in the record, *Lands Council v. Powell*, 395 F.3d
21 1019, 1030 (9th Cir. 2005).

1 9. Class Actions: If a class action, a proposal for how and when the class will be certified.

2 N/A

3
4 10. Related Cases: Any related cases or proceedings pending before another judge of this
5 court, or before another court or administrative body.

6 The parties believe that there are no related cases or proceedings pending.

7
8 11. Relief: All relief sought through complaint or counterclaim, including the amount of any
9 damages sought and a description of the bases on which damages are calculated. In
10 addition, any party from whom damages are sought must describe the bases on which it
11 contends damages should be calculated if liability is established.

12 Plaintiffs are seeking injunctive and declaratory relief and costs of litigation, including
13 attorneys' and expert fees. Plaintiffs are seeking a declaration that Defendants are not in
14 compliance with P.L. 109-58 § 1811 and an injunction with a schedule that contains specific
15 dates for the completion of interim and final steps to come into compliance with P.L. 109-58 §
16 1811. Defendants deny that plaintiffs are entitled to any relief and specifically deny that this
17 Court has jurisdiction to grant the type of affirmative relief plaintiffs seek under 5 U.S.C. §
18 706(1). *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64, 66-67 (2004).

19
20 12. Settlement and ADR: Prospects for settlement, ADR efforts to date, and a specific ADR
21 plan for the case, including compliance with ADR L.R. 3-5 and a description of key
22 discovery or motions necessary to position the parties to negotiate a resolution.

23 This case is essentially a deadline suit for a specific duty of Defendants. Counsel
24 involved in this case are very familiar with the strengths and weaknesses of their case and the
25

1 positions of the other parties. Therefore, the parties do not believe that ADR would necessarily
2 be helpful. The parties had an ADR Phone Conference on May 13, 2008.

3 Plaintiffs made a conceptual settlement offer to Defendants on April 14, 2008. Plaintiffs
4 requested one document on May 13, 2008 that Defendants mentioned in the ADR Phone
5 Conference, which defendants have provided. Plaintiffs provided Defendants with a draft
6 settlement agreement on May 30, 2008. Defendants have not responded to all of Plaintiffs'
7 settlement offers or requests.

8 As explained during the ADR Phone Conference, defendants believe that it makes sense
9 to revisit the issue of potential settlement only after a ruling on defendants' motion for judgment
10 on the pleadings.

12 13. Consent to Magistrate Judge For All Purposes: Whether all parties will consent to have a
14 magistrate judge conduct all further proceedings including trial and entry of judgment.

15 The parties have not consented to a Magistrate Judge for all purposes.

16 14. Other References: Whether the case is suitable for reference to binding arbitration, a
17 special master, or the Judicial Panel on Multidistrict Litigation.

18 N/A

19 15. Narrowing of Issues: Issues that can be narrowed by agreement or by motion, suggestions
20 to expedite the presentation of evidence at trial (e.g., through summaries or stipulated
21 facts), and any request to bifurcate issues, claims, or defenses.

22 The parties believe that a trial will not be necessary for this case as the issues should be
23 resolved through dispositive motions.

24 25. 16. Expedited Schedule: Whether this is the type of case that can be handled on an expedited
basis with streamlined procedures.

1 Plaintiffs believe that this is essentially a deadline suit involving an issue with significant
 2 ramifications for public health and ecological health. Therefore, a rapid resolution is appropriate
 3 but no special procedures are needed for this resolution. Defendants dispute that this case
 4 involves any immediate public or ecological health concerns, given that the dispute in question
 5 concerns the conduct of a study, and not the implementation of any particular actions.

7
 8 17. Scheduling: Proposed dates for designation of experts, discovery cutoff, hearing of
 9 dispositive motions, pretrial conference and trial.

10 The Plaintiffs suggest the following schedule for cross-motions for summary judgment:

11 Defendants believe that the above schedule is acceptable.

12 13 14 15 16 17 18 19 20 21	10 Business Days after Court's ruling on Motion for Judgment on the Pleadings	Defendants' File Administrative Record1
	30 days later	Plaintiffs' motion for summary judgment
	30 days later	Defendants' opposition and cross-motion for summary judgment
	14 days later	Plaintiffs' reply in support of motion for summary judgment and opposition to Defendants' cross-motion for summary judgment
	14 days later	Defendants' reply in support of cross-motion for summary judgment
	7 days later	Plaintiffs' optional sur-reply if Plaintiffs believe Defendants have raised new issues in their reply brief.
	1 st Available Date	Hearing on cross-motions for summary judgment

22
 23 18. Trial: Whether the case will be tried to a jury or to the court and the expected length of
 24 the trial.
 25

1 Assuming the Court holds that this case is to be decided based on an Administrative Record.

1 N/A

- 2 19. Disclosure of Non-party Interested Entities or Persons: Whether each party has filed the
 3 “Certification of Interested Entities or Persons” required by Civil Local Rule 3-16. **In**
 4 **addition**, each party must restate in the case management statement the contents of its
 5 certification by identifying any persons, firms, partnerships, corporations (including
 6 parent corporations) or other entities known by the party to have either: (i) a financial
 7 interest in the subject matter in controversy or in a party to the proceeding; or (ii) any
 8 other kind of interest that could be substantially affected by the outcome of the
 9 proceeding.

10 Plaintiffs do not know of any entity with an interest in the subject matter of this case or
 11 could be substantially affected by the outcome of the proceeding except Plaintiffs and their
 12 counsel.

- 13 20. Such other matters as may facilitate the just, speedy and inexpensive disposition of this
 14 matter.

15 None.

16
 17 Respectfully Submitted,

18 19 /s/ Joanne Spalding

20 21 22 23
 24 Joanne Spalding (CA Bar. No. 169560)
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33 Dated: August __, 2008

1 **CERTIFICATE OF SERVICE**
2
3
4

I hereby certify that on the 13th day of August, a true and accurate copy of the Joint Case
Management Statement with the Clerk of Court using the CM/ECF system.

Respectfully submitted, this 13th day of August, 2008.

7
8 /s/ Hadley A. Davis
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